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Supreme Court No. 81332-9

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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RESIDENTS OPPOSED TO KITTITAS TURBINES,  
KITTITAS COUNTY, and F. STEVEN LATHROP, et al.,

Petitioners,

v.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION  
COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the  
State of Washington,

Respondents.

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**BRIEF OF *AMICUS CURIAE*  
NW ENERGY COALITION**

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SARA PATTON  
Executive Director  
NW Energy Coalition  
811 1st Avenue, Suite 305  
Seattle, Washington 98104  
(206) 621-0094

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## **I. INTRODUCTION**

Washington's legislature has enacted measures aimed at responding to the global challenge of climate change while ensuring that the citizens of Washington enjoy affordable, abundant power for all. Washington's governor has developed greenhouse gas reduction policies and participates in a regional conglomerate of governors promoting common climate goals. The legislature has equipped the state with the tools to implement these policies through legislation that empowers the state to fully occupy the field of energy facility siting. In so doing, it has creating a "one-stop" permitting agency, the Energy Facility Site Evaluation Council (the "EFSEC"), which must process applications in a prompt and predictable fashion. In 2002, the legislature affirmatively added alternative energy sources, such as wind, to the types of facilities over which EFSEC has authority. The citizens of Washington have added their voices by approving Initiative Measure 937, which requires certain electric utilities to meet targets for energy efficiency and use of renewable energy resources.

The Kittitas Valley Wind Power Project (the "KVVPP") will meet every one of these objectives while fully addressing the impacts of the project itself. NW Energy Coalition respectfully encourages this Court

to grant expedited review and affirm the governor's decision to approve the KVVPP. The state of Washington needs a predictable method for evaluation, approval, and delivery of abundant, affordable, clean, renewable energy to facility developers, utilities, and end users: all the citizens of Washington.

## **II. IDENTITY AND INTEREST OF *AMICUS CURIAE***

NW Energy Coalition ("NWECC") is a regional alliance of conservation, low-income, and consumer advocate organizations, utilities, businesses, labor organizations, communities of faith, and citizen activists. NWECC's basic goal is to ensure a clean and affordable energy future, based on four pillars: (1) efficiency; (2) clean, renewable energy; (3) protection of consumers and low-income families in energy policy decisions; and (4) restoration of fish and wildlife in the Columbia River basin. Organized in 1981, NWECC pursues its goals through active participation in development of legislation, public utility commission dockets, Bonneville Power Administration policies, and rate cases, by assisting with individual utility decision-making, and through commenting and, at times, participating in energy facility siting processes. NWECC strongly supports development of new renewable energy generation only for those facilities that are well-sited and do not cause harm to human

health or the environment. NWEAC supported passage of Initiative 937 and has been involved in the development of regulations to implement its mandates.

### **III. ISSUE OF CONCERN TO AMICUS CURIAE**

Should the court expedite its review of and uphold the Governor's decision to approve the KVVPP under Washington's statutory framework for processing energy facility siting applications, including alternative energy such as wind, so that the energy policies of timely delivery of abundant, affordable, clean, and renewable energy can be attained?

### **IV. STATEMENT OF THE CASE**

Sagebrush Power Partners, LLC ("Sagebrush"), at Brief of Respondent, pages 3-12, has established a Counterstatement of the Facts, which is incorporated herein by this reference. It is respectfully submitted that this Court may take judicial notice of the energy crisis—lack of abundance and affordability—that has developed in the years since the KVVPP was first proposed.

### **V. ARGUMENT**

#### **A. Long-standing Legislative Policy Supports the Expedited Review of the Governor's Decision to Approve the KVVPP**

Amicus NWEAC submits that prompt review and affirmation of Governor Gregoire's decision to approve the KVVPP, including her

decision to preempt Kittitas County's land use regulations aimed at appropriating energy facility siting authority for itself, is critical to the implementation of the legislature's energy policies.

Abundant energy at a reasonable cost for the citizens of this state is a keystone of the state's energy policy. RCW 80.50.010(3). Neither of those elements—abundance or affordability—are any more available in today's economy than they were at the time the legislature first enacted RCW 80.50 in 1970, when the emergent technology was nuclear power. Recognizing the need for affordable and abundant power, and cognizant of the inherent difficulties in siting energy facilities anywhere in the state, the legislature charged the EFSEC with the task of processing applications for the siting of energy facilities in a manner that is “timely and without unnecessary delay” while taking into consideration the broad interests of both the public and the environment. RCW 80.50.010(5). In 2002, NWEA actively supported the successful legislative effort to add alternative energy facilities, including wind, to the already existing thermal energy facilities under the purview of the EFSEC. Laws of 2001, ch. 214, §§ 2(2), 3(17).

In the interest of avoiding duplicative processes and the delay that results from repetitive reviews, the legislature determined that if called on,



the state would be the sole arbiter of the decisions necessary to locate, construct, and operate energy facilities. RCW 80.50.110(2). The EFSEC must review and render a recommendation on an application for energy facility siting and, if requested, preemption of local land use rules and regulations, within 12 months. RCW 80.50.100(1). Upon receipt of an EFSEC recommendation on an application, it is incumbent upon the governor render his or her decision to approve, reject, or remand the application with further instructions within 60 days. RCW 80.50.100(2)(a)-(c); *Lathrop v. State Energy Facility Site Evaluation Council*, 130 Wn. App. 147, 151, 121 P.3d 774 (2005).

Duplication of process inevitably delays the siting of energy facilities, and the KVVPP is a perfect case in point. The EFSEC strove to ensure that local land use regulations were given reasonable consideration within the state agency's siting framework pursuant to the former WAC 463-28-030(1), but those good intentions resulted in a process whereby a single application has been under review for five years. The Kittitas County land use consistency portion of the EFSEC siting process alone took nine months—from September 2005, when Sagebrush submitted its Development Activities Application to the county, to June 6, 2006, when

the county refused to grant a subarea amendment and rezone to provide the project with local land use consistency. AR 8244-8252.

During that time, the scope of the project diminished from a proposed 120 turbines to a maximum of only 65. AR 14277. Neither the public's need for abundant affordable power nor its interest in timely and reliable delivery of such power is served when a project is halved in capacity over the course of half a decade of review process. To this day, the KVVPP is not built, and no electrical consumers in Washington have been able to use the energy the project seeks to harness. NWEA's members still await the delivery of KVVPP's clean, affordable power.

Expedited judicial review of this case and a timely decision upholding the governor's approval of the project will affirm and fulfill the legislature's interest in ensuring provision of "abundant energy at reasonable cost." It is a decision that has impacts beyond the instant project, as other power facility developers will finally receive a clear indication that there is certainty and predictability in Washington's siting process. Ultimately, assurance to other utilities that the state's siting authority and one-stop permitting process remain intact may encourage further energy facility development, a benefit redounding to the consumers, who await abundant, affordable, clean, renewable power.

**B. Mandates on Targeted Clean, Renewable Energy Standards Can Only Be Met Through the State's Predictable and Timely Siting Process.**

Since Sagebrush submitted its application for site certification in 2003, significant events have occurred that amplify the need for timely siting of renewable energy facilities.

**1. RCW 80.70**

On March 31, 2004, Washington Governor Gary Locke signed legislation codified at chapter 80.70 RCW, establishing what was then the strongest carbon dioxide mitigation standard for new power plants in the nation. As a result, new power plants over 25 megawatts and expansions of capacity at existing plants must mitigate 20 percent of total carbon dioxide emissions or elect to proceed down a compliance path by paying a biannually adjusted dollar amount per ton of CO<sub>2</sub> to a qualified organization that will purchase carbon offsets. Laws of 2004, ch. 224. In this fashion, the state of Washington became a leader in the nation's nascent response to the issue of climate change.

**2. Initiative Measure 937**

In November 2006, voters of the state of Washington passed Initiative Measure 937 ("I-937"), which was sponsored by NWEA and strongly supported by a variety of its members. I-937 requires "certain

electric utilities with 25,000 or more customers to meet certain targets for energy conservation and use of renewable energy resources, as defined, including energy credits, or pay penalties.” *Initiative Measure 937 Ballot Title, Proposed by Initiative Petition*. A copy of the Secretary of State’s ballot measure is attached hereto as Appendix A. Under I-937, whose regulations are currently being developed by the state Department of Community, Trade and Economic Development, subject utilities must meet specific targets for using eligible renewable resources to produce electricity. The targets themselves are not vague goals or objectives, but carry concrete criteria, deadlines, and consequences. Each subject utility must have sufficient renewable resources in its power production portfolio to serve at least three percent of its load by 2012 to 2015, with mandatory annual reports of progress toward this standard beginning in June 2012. *Id.* The renewable percentage increases to nine percent of load between 2016 through 2019, topping out at 15 percent of load by 2020. *Id.* Failure to reach these targets results in a penalty of \$50 for each megawatt hour of shortfall, adjusted annually for inflation. *Id.* Utilities are entitled to recover the cost of compliance from their customers. *Id.*

Compliance reporting for utilities subject to the renewable portfolio standards begins in just four years, yet the significant uncertainty

about energy facility siting authority in Washington has resulted in a five-year (and counting) approval process for the KVVPP. Even with timely recommendations by the EFSEC, prompt decisions by the governor, and expedited review by the courts, there is always the attendant time of construction of the project to get its clean, renewable power on the grid. If the mandates of I-937 are going to be met, a clear and concise message must be handed down that gives all parties clear direction on how, and whether, they will be able to timely comply.

### **3. Executive Order 07-02**

On April 17, 2007, the Washington legislature passed Engrossed Substitute Senate Brief 6001, which codified at RCW 80.80 the emissions-reduction goals and policy recommendations in Governor Gregoire's "Climate Change Challenge" Executive Order 07-02, issued February 7, 2007. This bill sets emissions performance standards that limit electric utilities' ability to sign new or renewed long-term contracts with power plants whose greenhouse gas emissions exceed those of modern natural-gas-fueled power plants. Satisfaction of these standards may not be met by the purchase of offsets. RCW 80.80.040. This legislation reflects the broad acknowledgement that new energy facilities have the potential to either exacerbate or alleviate climate change. The Northwest Power and

Conservation Council, with two members appointed by each of the governors of the four northwest states, issued a paper in November 2007 entitled "Carbon Dioxide Footprint of the Northwest Power System," Council Document 2007-15. The paper looked at already adopted climate goals and estimated that the region could meet those goals for the power system only if it uses energy efficiency and carbon-free renewable energy to meet all new electrical demand *and* to retire between 2300 and 3300 megawatts of existing coal generation. Against this backdrop, siting of a new fossil fuel power plant or a new wind energy facility, and the consequences thereof, become a regional rather than a strictly local question.

The extraordinary policy mandates discussed above require measurable actions now, not actions delayed or deferred to some unspecified time in the future. The command to continue provision of abundant and affordable energy in a clean, renewable, environmentally responsible fashion, comes from every sector: governors, legislators, and citizens. This is why Governor Gregoire received and evaluated the recommendation of the EFSEC to preempt Kittitas County and approve the KVVPP. In approving the project following an initial remand for further proceedings, she noted:

It is clear that Washington is growing and with that growth our demands for energy resources also increase. It is also the clear and compelling policy of the state to prefer new resources that have the least impact on our state's natural environment. Our legislators and our citizens have recently articulated their strong preferences for renewable resources. Those policies are not in doubt and I remain committed to them. To fulfill them, we will have to build infrastructure that broadly benefits our citizens and may impose burdens on some.

The benefits of this Project are considerable and will accrue to the citizens across our state. The Project will generate renewable energy sufficient to supply power to tens of thousands of homes, by feeding power to the grid that supplies our electricity needs. It will also provide permanent and temporary jobs, millions of dollars of investment and other economic benefits, and increased valuation of the county's real property to support state and local schools and other local purpose districts. Further, these benefits are being secured without contributing to climate change. Projects like these are consistent with Washington's long-standing commitment to clean energy, as expressed by the Legislature and recently by a majority of the state's citizens through I-937.

AR 11907.

Petitioners Kittitas County and ROKT/Lathrop engage in strained interpretations of RCW 80.50 to arrive at the absurd conclusion that, inter

alia, EFSEC does not have authority over alternative energy facilities in the first instances. Kittitas Br. at 18-28; ROKT Br. at 38-40. NWECC urges this Court to avoid such a literal reading as that posited by the Petitioners and avoid its “unlikely, absurd, or strained consequences” cautioned against in *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). NWECC further encourages this Court to decline Petitioners’ invitation to ignore the fact that it is the governor’s decision that they seek to reverse, rather than an advisory recommendation of the EFSEC that carries no weight of law.

Of equally great import, Petitioners’ arguments espouse the notion that each independent jurisdiction in the state of Washington may prioritize local concerns and implement them through local siting processes without regard for the statewide mandates on clean, renewable energy, the benefits and impacts of which affect every Washington citizen. Giving credence to such a position would be contrary to the gubernatorial, legislative, and voted-on policies of this state to promote renewable energy facilities, and would imperil the state utilities’ ability to answer the voters’ demand for clean and renewable energy now.



## VI. CONCLUSION

Amicus NWECA respectfully requests that the Court exercise its authority to hear this matter in an expedited fashion and affirm the governor's approval of the KVVPP project.

DATED: May 27<sup>th</sup>, 2008.

A handwritten signature in cursive script, reading "Sara Patton", written over a horizontal line.

Sara Patton  
Executive Director  
NW Energy Coalition  
811 1st Avenue, Suite 305  
Seattle, Washington 98104  
(206) 621-0094



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## APPENDIX A

**Initiative Measure 937**  
**Proposed by Initiative Petition**

**Official Ballot Title:**

Initiative Measure No. 937 concerns energy resource use by certain electric utilities.

This measure would require certain electric utilities with 25,000 or more customers to meet certain targets for energy conservation and use of renewable energy resources, as defined, including energy credits, or pay penalties.

Should this measure be enacted into law?

Yes ☐ No ☐

**Note:** The ballot title and explanatory statement were written by the Attorney General as required by law. The Fiscal Impact Statement was written by the Office of Financial Management. View complete text of Initiative Measure 937: [PDF](#)

**Fiscal Impact Statement****Fiscal Impact Statement for Initiative 937**

Initiative 937 would cost state government \$2.34 million in administrative costs over 14 years or an average of \$167,000 per year. The offices of the Attorney General, Auditor, Utilities and Transportation Commission, and the departments of Community Trade and Economic Development, and Labor and Industries each would have a role in monitoring or assisting compliance. The initiative's fiscal impact on Washington's local governments cannot be determined due to variables ranging from future fuel costs to changes in demand for electricity. For the same reason, the impact of electricity costs for state and local governments cannot be determined.

**Assumptions for Fiscal Analysis of Initiative 937**

- The initiative requires the 17 largest electric utilities, which includes both public and private entities, in Washington to have 15 percent of their power supply generated from renewable resources by 2020; interim targets are also established. The utilities must also set and meet energy conservation targets starting in 2010.
- The Attorney General, State Auditor, Utilities and Transportation Commission, and the departments of Community Trade and Economic Development, and Labor and Industries each would require additional funds to implement the initiative. These funds would pay for: enforcement activity by state agencies to ensure resource targets were being met; rule making; legal advice; additional audits; and development of required apprenticeship programs for the renewable energy field.
- Local utility cost and revenue impacts are a function of fuel mix, load growth, and future fuel costs and cannot be estimated at this time.

**Explanatory Statement****The law as it presently exists:**

Electricity is supplied in Washington by both privately-owned companies (investor-owned utilities) and by publicly-owned utilities (utilities owned by cities, public utility districts, and certain other local government units). Some of these utilities operate their own facilities for generating electricity (typically hydroelectric dams or coal- or gas-fired generators). Some of these utilities purchase some or all of their electrical power from other utilities, from private producers or sellers of power, or from regional governmental entities such as the

Bonneville Power Administration.

The state Utilities and Transportation Commission (UTC) regulates the rates and practices of investor-owned electric utilities serving customers in this state. Under existing law, the UTC is required to adopt and implement policies to provide financial incentives for energy efficiency programs, and may authorize utilities to issue conservation bonds for the construction, acquisition, and operation of conservation assets. Each investor-owned electric utility has conservation service tariffs that charge rates sufficient to recover from its customers the utility's cost of conservation investment.

The UTC does not regulate publicly-owned electric utilities that serve customers in this state. These utilities are directly responsible to the voters in their service territories for their rates, services, and policies. Under existing law, cities operating electric utilities may issue bonds or otherwise borrow money for energy conservation purposes, and are required to develop conservation plans to assist the public in conserving energy. Public utility districts are subject to similar energy conservation planning requirements, and are also authorized to assist citizens by financing the acquisition and installation of materials and equipment for energy conservation purposes.

#### **The effect of the proposed measure, if it becomes law:**

Under existing law, electric utilities in this state are not obligated to meet any specific numeric targets for either energy conservation or use of renewable resources to produce power. The proposed measure would impose targets for energy conservation and use of eligible renewable resources on all electric utilities that serve more than 25,000 customers in this state.

**Energy conservation.** By January 1, 2010, each such electric utility would be required to identify its "achievable cost-effective conservation potential" through 2019, and to update this assessment at least every two years. "Conservation" would mean "reduction in electric power consumption resulting from increases in the efficiency of energy use, production or distribution." Each utility would be required to set an annual target consisting of a certain share of this achievable cost-effective conservation potential, and to meet that share of conservation. In determining whether a utility meets its annual conservation target, the utility could include the reduction in electric energy sold to retail customers which own and use a high-efficiency cogeneration facility to meet some of their own power needs.

**Renewable resources.** Each utility would also be required to meet specific targets for using eligible renewable resources to produce electricity, stated as a percentage of the utility's load. "Load" refers to the total amount of electricity the utility sold that year to its retail customers. Examples of eligible renewable resources include wind farms, solar panels, and geothermal plants. With limited exceptions, use of fresh water by hydroelectric dams and plants is not included as an eligible renewable resource.

Each utility would have to use renewable resources to serve at least three percent (3%) of its load by 2012 through 2015; nine percent (9%) of load by 2016 through 2019, and fifteen percent (15%) of load by 2020 and thereafter. A utility could comply with its annual renewable resource target by using the requisite amount of eligible renewable resources, by purchasing enough eligible renewable resource credits (or a combination of each), or by investing at least four percent (4%) of its total annual retail revenue requirement in renewable resources.

**Cost recovery, penalties, reporting and enforcement.** An investor-owned utility would be entitled to recover from its customers all costs the utility prudently incurred to comply with the measure. Similarly, each publicly-owned utility would be expected to recover its cost of compliance from its customers.

If a utility fails to comply with either the energy conservation or the renewable energy targets, it would have to pay a penalty in the amount of \$50 for each megawatt-hour of shortfall. This penalty amount would be adjusted annually for inflation. Penalty payments would go into a special account, and could only be used for the purchase of renewable energy credits or for energy conservation projects at state and local government facilities or publicly-owned educational institutions.

In each year beginning in June 2012, each utility would be required to report to the state Department of Community, Trade, and Economic Development (CTED) on the utility's progress in the preceding year in meeting the targets. The investor-owned utilities would supply the same information to the UTC. Each utility would be required to make these reports available to its customers.

The UTC would be authorized to implement and enforce the measure as to investor-owned utilities, and to adopt rules accordingly. For publicly-owned utilities, CTED would be authorized to adopt procedural rules and documentation requirements; the state auditor would be responsible for auditing compliance with the measure; and the Attorney General's Office would be responsible for enforcement.

**Statement For Initiative Measure 937**

**INITIATIVE 937 PROVIDES A CLEANER, MORE  
AFFORDABLE ENERGY FUTURE**

As Washington's demand for energy grows, we can choose where we get our electricity.

We can either burn more fossil fuels like coal that pollute the air. Or we can use more clean, affordable renewable energy like wind and solar power – produced here in the Northwest.

I-937 is the cleaner, more affordable energy choice:

- *15% renewable energy.* It requires the largest electric utilities to get 15% of their electricity from *new* renewable energy by 2020.
- *Energy conservation.* It requires utilities to help consumers and businesses save money through energy conservation.

### **INITIATIVE 937 SAVES ENERGY AND SAVES US MONEY**

I-937 gives us cheaper, renewable alternatives like wind and solar. According to Puget Sound Energy, just two Washington wind farms are projected to save consumers \$170 million. Renewable energy strengthens family farms by paying up to \$5,000/year per wind turbine.

I-937 also saves money by requiring utilities to offer energy efficiency programs, like cash rebates for energy efficient appliances, home weatherization, and lighting, heating and cooling systems for businesses.

### **INITIATIVE 937 IS A COMMON SENSE, PROVEN APPROACH**

I-937 is an approach that's already working in 20 states. I-937 lets us take hold of our energy future and reduce our dependence on fossil fuels.

### **INITIATIVE 937 WILL GIVE US CLEANER AIR**

Pollution from fossil fuels contributes to thousands of cases of lung disease and asthma each year. Renewable energy helps protect our families' health by keeping our air clean.

Join the broad coalition including Union of Concerned Scientists, Washington Public Utility District Association, and Physicians for Social Responsibility choosing a clean energy future. *Vote yes! on I-937.*

For more information, visit [www.yeson937.org](http://www.yeson937.org) or call 206.283.3335.

### ***Rebuttal of Statement Against***

Don't be misled by corporate polluters. I-937 opponents run the Washington Research Council; don't trust its study.

I-937 will save us energy and money – through conservation and cheaper, cleaner energy.

Twenty states have adopted this approach, with proven cost savings – in just two years, Colorado consumers have saved \$14 million.

I-937 protects consumers and reduces dependence on fossil fuels.

Yes on I-937! For cleaner air and more affordable energy.

### ***Voters Pamphlet Argument Prepared by:***

NINA CARTER, Executive Director, Audubon Washington; GREGORY REDDING, M.D., President-elect, American Lung Association of Washington and Idaho; BARBARA SEITL, President, League of Women Voters of Washington; BOB POWERS, family farmers, Bickleton, Washington (Klickitat County); MICHAEL O'SULLIVAN, Government Relations, American Cancer Society, Great West Division; ART BOULTON, President, Washington State Alliance of Retired Americans.

### ***Statement Against Initiative Measure 937***

### **I-937 WILL INCREASE ELECTRIC RATES AND UTILITY TAXES FOR HOMES AND BUSINESSES.**

Alternative energy projects are being built now, but when required by law energy will be more costly for everyone. The non-partisan Washington Research Council estimates that I-937 will cost at least \$185 million per year and could cost twice that much. *Vote no* on higher energy costs.

Alternative energy projects are heavily subsidized by a federal tax cut that ends next year. If it is not renewed by Congress, the cost for alternative energy could increase an extra 40%.

Higher energy costs put family-wage manufacturing and high-tech jobs at risk and hurt hospitals, family farms and small businesses.

Lower-income households and senior citizens on fixed incomes will be disproportionately impacted by higher energy bills.

### **I-937 DOES NOT TREAT LOW-COST HYDROPOWER AS "RENEWABLE ENERGY" WHILE OTHER STATES DO.**

I-937 will cause low-cost hydropower to be sold to California while local utilities buy higher cost alternative energy for our homes and businesses.

## **FINES ON UTILITIES FOR NOT HAVING ENOUGH "RENEWABLE ENERGY" WILL BE PAID BY HOMES AND BUSINESSES.**

Mandates and fines proposed by I-937 are not the way to promote alternative energy. We are paying too much for our energy bills now.

## **ALTERNATIVE ENERGY PROJECTS ONLY OPERATE SPORADICALLY AND MANY COMMUNITIES WON'T ALLOW THEM.**

Wind and sunshine are irregular energy sources. Hydropower or thermal plants are needed to supply steady power for homes and businesses. But hydropower resources are being cut to protect fish and may not be available to supplement alternative energy.

I-937 does not require utilities to build alternative energy projects in Washington. Kittitas and Benton counties have rejected wind power proposals due to public opposition. Other states may financially benefit from these mandated projects, while we pay the cost.

Vote No and visit [www.NOonI-937.com](http://www.NOonI-937.com).

### ***Rebuttal of Statement For***

Puget Sound Energy and other utilities are already building wind projects, but only when they make economic sense. I-937 will make non-hydropower renewable energy even more expensive. The Northwest Power and Conservation Council reports the cost of new wind projects has "risen substantially," because of mandates in other states.

There is nothing affordable about I-937. \$185 to \$370 million per year in additional energy costs to our households and businesses is too much. Vote no.

### ***Voters Pamphlet Argument Prepared by:***

DON BRUNELL, President, Association of Washington Business; KRISTINE M. MIKKELSEN, CEO, Inland Power and Light Company; LINDA LANHAM, Aerospace Futures Alliance of Washington; ROBERT HEMSLEY, former G.A. representative, Western Pulp/Paper Workers Association; DARRYLL OLSEN, Ph.D., board representative, Columbia Snake River Irrigators Association; JUDY COOVERT, small business co-owner, Printcom, Inc.

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Washington Secretary of State  
520 Union Ave SE  
PO Box 40229, Olympia WA 98504-0229  
(360) 902-4180



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